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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 4

UNITED STATES OF AMERICA, PETITIONER

v.

JUDITH COPLON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit (R. 2189), reversing respondent's conviction in the District Court for the Southern District of New York on charges of conspiracy and espionage.

OPINIONS BELOW

The opinion of the District Court on the "wiretapping" issues (R. 2146) is reported at 88 F. Supp. 921. The opinion of the District Court denying the return of property seized from respondent

at the time of her arrest without a warrant (R. 347) is reported at 89 F. Supp. 142. The opinion of the Court of Appeals (R. 2174) is reported at 185 F. 2d 629.

JURISDICTION

The judgment of the Court of Appeals was entered December 5, 1950 (R. 2189). On December 20, 1950, Mr. Justice Jackson entered an order extending the time for filing a petition for a writ of certiorari to and including February 3, 1951 (R. 2191). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether respondent's arrest without a warrant was lawful, so as to make admissible in evidence against her the documents seized from her person at the time of her arrest.

2. Whether the Court of Appeals correctly applied in this case the rule of *Nardone* v. *United States*, 308 U.S. 338.

STATUTES INVOLVED

18 U.S.C. 3052 provided on March 4, 1949, the date of respondent's arrest[1]:

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[1] The Act of January 10, 1951, c. 1221, § 1 (Public Law 915, 81st Cong., 2d sess.), amended 18 U.S.C. 3052 so as to make it read as follows:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under

> The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest.

Sections 183, 184, and 185 of the New York Code of Criminal Procedure provide:

> §183. A private person may arrest another.
>
> 1. For a crime, committed or attempted in his presence;
>
> 2. When the person arrested has committed a felony, although not in his presence.
>
> §184. A private person before making an arrest, must inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission.
>
> §185. A private person, who has arrested another for the commission of a crime, must,

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the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

> without unnecessary delay, take him before a magistrate, or deliver him to a peace officer.

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (47 U.S.C. 605), provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

On March 10, 1949, an indictment in four counts (R. 14) was filed in the United States District Court for the Southern District of New York, charging the respondent Judith Coplon and a co-defendant, Valentine A. Gubitchev, with conspiracy and espionage. Count 1 charged the defendants with having conspired, in violation of the general conspiracy statute (18 U.S.C. 371), to violate 18 U.S.C. 793, 794, and 2071, and to defraud the United States.[2] Count 4 charged respondent alone

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[2] More specifically, the objectives of the alleged conspiracy were as follows: (1) that respondent, an employee of the Department of Justice, would copy, take, make, and obtain documents relating to the national defense (intelligence reports relating to espionage and counter-espionage activities in the United States), with intent and reason to believe that they would be used to the injury of the United States and to the advantage of a foreign nation (in violation of 18 U.S.C. 793, paragraph 2); (2) that Gubitchev would receive such documents from respondent with knowledge that they were taken contrary to law (in violation of 18 U.S.C. 793, paragraph 3);

with having committed the substantive offense of attempting, on or about March 4, 1949, to transmit to Gubitchev, a subject and citizen of the U.S.S.R., documents, writings, notes, and information relating to the national defense (to wit, documents, etc., containing intelligence reports relating to espionage and counter-espionage activities in the United States), with intent and reason to believe that they would be used to the injury of the United States and to the advantage of a foreign nation, in violation of 18 U.S.C. 794(a). Following a trial by jury, respondent was found guilty on each of the foregoing counts[3] and was sentenced to 5 years' imprisonment on count 1 and to 15

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(3) that respondent would wilfully transmit such documents to persons not entitled to receive them (in violation of 18 U.S.C. 793, paragraph 4); (4) that respondent would transmit such documents to Gubitchev, a subject and citizen of the U.S.S.R., with intent and reason to believe that they would be used to the injury of the United States and to the advantage of a foreign nation (in violation of 18 U.S.C. 794(a)); (5) that respondent would unlawfully remove and conceal documents filed and deposited with the Department of Justice (in violation of 18 U.S.C. 2071); and (6) that the United States would be defrauded (a) by impairing and obstructing the lawful functions of the Department of Justice and the Federal Bureau of Investigation, and (b) of and concerning its right to the honest and faithful services of respondent as an employee of the Department of Justice.

[3] She was acquitted on count 2 (R. 16), which charged her alone with a substantive violation of 18 U.S.C. 793. Gubitchev was found guilty on the conspiracy count (count 1) and also on count 3, which charged him alone with a substantive violation of 18 U.S.C. 793. Execution of his sentence (5 years on count 1 and 10 years on count 3, to run consecutively) was suspended on condition that he depart the United States, never to return. Accepting the terms of this probation, he did not appeal his conviction.

years' imprisonment on count 4, to run concurrently (R. 2173).

On appeal to the Court of Appeals for the Second Circuit, respondent's conviction was reversed and a new trial ordered (R. 2188, 2189). The reversal was predicated on the court's decision that the trial judge had erred (1) in refusing to suppress the use as evidence of certain incriminating documents, vital to the prosecution's case, which had been seized from respondent's person on the occasion of her arrest, without a warrant, by an F.B.I. agent on the evening of March 4, 1949 (R. 2177-2181); (2) in declining to make available to the defense certain F. B. I. records, personally examined by him *in camera,* from which he satisfied himself that no substantial part of the prosecution's case exclusively originated, either directly or indirectly, from intercepted telephonic communications to which respondent was a party (R. 2181-2186); and (3) in foreclosing the defense's attempt to ascertain, by cross-examination of agents of the F.B.I., whether the original "confidential informant," whose "tip" set in motion the investigation of respondent for suspected espionage, was a "wiretapper" (R. 2186-2188).

Before discussion of the grounds of the Court of Appeals' reversal of the conviction, it is desirable to set forth briefly the evidence adduced by the Government in support of the conviction. For present purposes, the following summary of

the evidence, taken from the opinion of the Court of Appeals (R. 2175-2176),[4] is adequate:

> Judith Coplon had been employed by the United States Department of Justice in New York from June 15th, 1943, until January 16th, 1945, when she was transferred to Washington to the position of "political analyst" in the "Section" which had charge of the registration of foreign agents. Reports of agents of the Federal Bureau of Investigation concerning "internal security" did not come to this section but to another, the Internal Security Section, to which in October, 1948, she was temporarily assigned for the examination of some of such reports. She continued at this until the beginning of 1949, by which time one, Foley, who was in charge both of the registration and the security sections had been told that she was under suspicion. Foley put an end to her work in the security section and thereafter confined her to the registration section. She protested against this as a slight upon her ability, and early in February went to her successor in the security section, asked to see some of the reports that were filed there, and took away some of them and soon afterwards she asked the successor to send her any such reports that concerned foreign embassies or the like, particularly any relating to Russian agents. Early in January Foley mentioned to her a report about Russian agents

[4] The Court of Appeals took occasion in its opinion to state, as a reason for not directing dismissal of the indictment, that respondent's "guilt is plain" (R. 2188).

which she twice asked to see, but which he each time refused to show her because it was a "top secret." The other and most important part of the evidence upon which she was convicted consisted of three trips to New York, the first, on January 14th [1949]; the second, on February 18th; and the third on March 4th. In each case she announced her intention in advance to Foley and got his consent; and on each she was shadowed by agents of the Federal Bureau of Investigation, who managed to keep her pretty continually, though not always, under observation. On the first trip she met Gubitchev, obviously by prearrangement, and they were together for some time, but, so far as any of the agents could see, no papers passed from her to him. The second meeting was in the same general locality as the first—upper Broadway in Manhattan—and again the agents saw nothing pass, although at one time Gubitchev seemed to reach in front of her body and may have got his hand in her purse which was open.[5] The third meeting did not greatly differ from the other two, except that both appeared to be acting with even more circumspection than before. At about 9:30 P.M. they were both arrested; without a warrant; and, when her purse was opened, there was found in it a sealed packet containing many incriminating documents, which she would almost certainly not have been carrying to such an interview, were she

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[5 It is important to note that this second meeting lasted only a few seconds.]

not intending to pass them to Gubitchev. On all three occasions the two had wandered aimlessly about, meeting, separating, rejoining, going hither and yon, continually looking back, and in general giving every appearance of persons who thought they might be shadowed and wished to escape being trailed.

Among the documents in the packet was a decoy letter prepared by one, Lamphere, an agent of the Bureau, which professed to give information about the Russian trading corporation, "Amtorg," and which Foley had given her on March 4th, telling her that it was "hot and interesting." Besides the decoy, the documents included many "data slips": i.e. abstracts, made by her upon typewriters in her possession, or to which she had access, of records prepared by agents of the Federal Bureau of Investigation, for the most part those on file in the Internal Security Section. In most cases these related to the activities of persons in the United States, who were, or were suspected to be, acting on behalf of the Soviet Union, or one of its satellites. Finally, there was a statement typed by her saying that she had unsuccessfully tried to see the "top secret" report which, as we have said, Foley had refused to show her. All these documents, taken with the repeated instance in which she had shown an insistent wish to get access to such records, and with her meetings in New York, made out a case which must have satisfied any fair minded jury that she was engaged in the conspiracy with which she was charged; and that, when the right moment came, she

meant to pass the packet to Gubitchev. Indeed, it does not appear why she had not already done so before her arrest, as the agents presumably supposed that she had.

The relevant facts relating to the grounds on which the Court of Appeals reversed respondent's conviction may be briefly stated as follows:

Alleged illegality of the arrest and seizure incident thereto.—In a pre-trial motion filed October 19, 1949, respondent, pursuant to Rule 41(e), F.R. Crim. P., moved for an order directing the return to her of the documents seized from her person at the time of her arrest on the ground that the seizure was illegal because made incident to an arrest without warrant (R. 17-20). Following a hearing, District Judge Ryan entered an order and opinion denying the motion (R. 347). He concluded from the facts as summarized above from the opinion of the Court of Appeals, that "the arresting officer did have reasonable ground to believe that Judith Coplon was guilty of a felony cognizable under the laws of the United States, at the time of her arrest on March 4, 1949" (R. 348); that "the arresting officer had grounds for entertaining the belief that at the time of this defendant's arrest, there was a likelihood of her escaping before a warrant could be obtained" (*ibid.*); and that, therefore, the arrest without warrant by F.B.I. agent Granville was lawful under 18 U.S.C.

3052 (*supra*, p. 3), and the seizure made incident thereto was likewise valid.[6]

The Court of Appeals held that there was "no basis for the finding" that there was a likelihood of respondent's escaping before a warrant for her arrest could be obtained; that therefore one of the essential conditions of a valid arrest without warrant by an F.B.I. agent, as stated in 18 U.S.C. 3052, was absent; and that, accordingly, the admission in evidence of the documents seized from respondent's person as an incident of her arrest was error (R. 2177-2181).[7]

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[6] Judge Ryan explained the grounds of his decision as follows (R. 348):

"I have arrived at these conclusions [that the arresting officer had reasonable ground to believe respondent was guilty of a felony when he arrested her and that there was a likelihood of her escaping before a warrant could be obtained] by reason of a number of circumstances which had occurred prior to and on the night of March 4, which circumstances the arresting officer either personally observed or were brought to his attention as supervising agent in charge of the agents, by those who were under his supervision and direction in conducting the investigation in New York City of defendants herein. Among these circumstances (and I am not attempting to list all of them) are present: the official position occupied by the defendant Coplon and the nature of her duties; the national origin of the co-defendant Gubitchev and his associations; the furtive and elusive tactics pursued by the defendants on the night of March 4, and the observations made of both at the times of their previous meetings; the known modus operandi of persons engaged in espionage, and the likelihood of their evading arrest in the future, particularly in view of the nature of the crime, which the arresting officer had reasonable ground to believe they were then committing."

[7] The Court of Appeals, in another part of its opinion, held that the Government's evidence was sufficient to establish that at the time of respondent's arrest she had passed beyond the "zone of 'preparation'" and was actually in the process of "attempting" to transmit the documents in question to Gubitchev (the substantive offense charged in the fourth

The issues relating to "wiretapping."—The Government conceded prior to trial that the F.B.I. had utilized "wiretapping" in its investigation of respondent. The trial judge found (R. 2147-2148), and it is undisputed, that her residence telephone in Washington was monitored from January 6 to March 19, 1949; that her New York residence telephone was monitored from February 1, to May 2, and again from July 12 to November 10, 1949; and that her office telephone in the Department of Justice was monitored from January 25 to March 12, 1949. In addition, a microphone was installed in her office from January 25 to March 12, 1949.

Pursuant to the rule of *Nardone* v. *United States,* 308 U.S. 338, 341,[8] an exhaustive hearing was conducted, lasting from December 13, 1949, to January 17, 1950, for the purpose of ascertaining whether and to what extent any substantial portion of the evidence which the Government proposed to present against respondent was exclusively derived, directly or indirectly, from the

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count). Since this offense of attempting to transmit the documents was being committed in the presence of the arresting agent, it is clear that the court construed the "likelihood of escape" clause of 18 U.S.C. 3052—and in fact the entire statute—as applicable to arrests for felonies committed in the presence of the arresting officer as well as to arrests for felonies committed in the past and not in the arresting officer's presence. We think this construction is erroneous. See *infra*, pp. 17-26.

[8] "* * * Once that [wiretapping] is established * * * the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

above monitorings (R. 349-2124). At this hearing, as is explained in the Court of Appeals' opinion, the defense was permitted to examine all the recordings by disc or "logs" (handwritten notes) of the "taps" taken from her residence telephone in Washington, and many of those taken from her office telephone in Washington. In addition, the defense was permitted to examine most of the records of "taps" taken from her residence telephone in New York. Nothing in any of these records, it was conceded, could have constituted "leads" to any of the evidence introduced at the trial. The balance of "taps" records taken from respondent's office telephone in Washington and from her residence telephone in New York were personally examined by Judge Ryan *in camera*. His examination satisfied him that these records likewise contained nothing which could have constituted "leads" to any of the Government's proof. However, he refused to permit the defense to examine the latter records on the ground that their disclosure might be dangerous to national security. See R. 2182-2183.

At the conclusion of the hearing, Judge Ryan filed an order and opinion (R. 2146-2160) suppressing "all records, transcripts and notes of any kind made from intercepted telephonic communications of the defendants and the microphone-telephone communications of defendant Coplon," and likewise suppressing "all evidence obtained as a result

[of] use of such intercepted communications, except as that evidence has been demonstrated to me to spring from independent sources" (R. 2159). He denied, however, respondent's motion for "a dismissal of the indictment upon the ground that the proof of the charges contained therein is founded solely on evidence illegally obtained," because "[t]he government has shown to my satisfaction that it does have independent proof of the facts obtained by telephone and microphone interceptions" (*ibid.*).

With respect to the identity and character of the "confidential informant" who supplied the initial information which set in motion the investigation of respondent, Judge Ryan held (R. 2154):

> Testimony of several agents of the Federal Bureau of Investigation established that the first information received which set them on the trail of the defendants came from a "confidential informant." Counsel attempted to show that the confidential informant was a wire-tapper. The court sustained objections to all questions which sought the identity or character of the informant. This was done to prevent unnecessary probe into the confidential sources of information of the Bureau and since it has been settled that the government need not disclose the identity of informers unless it appears that disclosure is necessary or desirable to show defendant's innocence. [Citing authorities.] This necessity is not present here. Even if the infor-

> ant were a wire-tapper defendants did not thereby gain any immunity from prosecution for a subsequently committed crime. The unlawful interception of telephonic communications does not give the participants immunity as to all criminal enterprises planned or discussed, which are overheard by law enforcement officers. Plans and details of proposed criminal ventures so arranged may not be carried out and perfected with impunity, for no license or privilege to commit crime is conferred on wrongdoers by reason of the fact that the wires over which they talk are unlawfully tapped by agents.

In the Court of Appeals, respondent challenged the trial judge's refusal to permit cross-examination as to the source of the Government's original clue in this case and his refusal to make certain of the Government's wiretapping records available to her, on two principal grounds: (1) that she was entitled to ascertain whether the original clue was obtained by wiretapping a conversation to which she was a party, and (2) that but for such refusals she might have been able to show that she was arrested when she was because the Government had learned from wiretapping that she would have the incriminating documents upon her person at that time. The Court of Appeals apparently upheld the respondent's contentions on both grounds. It held that the respondent was entitled to discover whether the Government's original clue was derived from wiretapping (R. 2186-2188). It

also held that the Government's burden of showing that its proof was obtained from sources independent of wiretapping could not be satisfied except by making all of its wiretapping records available to the defense, and that the trial judge's *in camera* examination of some of those records was improper (R. 2184-2186).

In reversing the respondent's conviction, the Court of Appeals observed that her "guilt is plain," and suggested that "on another trial there may be more evidence of the likelihood of an escape; that the prosecution may decide to divulge the contents of the 'taps'; and that the examination as to the 'confidential informant' may go far enough to show that he was not a 'wiretapper' " (R. 2188).

REASONS FOR GRANTING THE WRIT

1. The court below, in holding that the papers taken from the respondent's purse on March 4, 1949, were inadmissible in evidence against her in that they were not seized as an incident to a lawful arrest, did so on the theory that 18 U.S.C. 3052 (formerly 5 U.S.C. 300a) restricted the powers of arrest of agents of the Federal Bureau of Investigation to less than those of a private person at common law and that, as thus restricted, the agent's arrest of the respondent was illegal. Since, as noted hereafter, the respondent was engaged in committing a felony at the time of her arrest, the precise decision below was that the requirement of

likelihood of escape in Section 3052 was applicable to arrests for felonies being committed in the presence of an F.B.I. agent, and that in this case there was no likelihood of respondent's escape before a warrant could be obtained for her arrest.

We believe that the decision is erroneous in both respects. Specifically, we urge:

> (a) that the power of an F.B.I. agent to make an arrest without warrant for a felony committed in his presence is not governed by Section 3052, but rather is defined by the local law of arrests by private persons, in this case New York law, under which respondent's arrest was lawful;
>
> (b) that even if such arrests are governed by Section 3052, the requirement of likelihood of escape was satisfied here.

a. There is not the slightest indication in the scanty legislative history of what is now 18 U.S.C. 3052 that either the Congress, or the Department of Justice which requested the legislation, ever regarded it as reducing the powers of arrest which F.B.I. agents could exercise as private persons. That section is based upon the Act of June 18, 1934, c. 595, 48 Stat. 1008.[9] The files of the Department

[9] The opinion of the Court of Appeals sets forth the changes made by the House and Senate Judiciary Committee in the bill as introduced, H.R. 9476, 73d Cong., 2d Sess. These changes were not explained in either the committee reports, H. Rept. 1824 and S. Rept. 1434, or in the brief floor discussions, 78 Cong. Rec. 10865, 11677, 12167. As finally enacted, it read:

* * * the Director, Assistant Directors, agents, and

of Justice reveal that earlier, in a memorandum dated April 7, 1934, addressed by the Director of the F.B.I. to the then Assistant to the Attorney General, it was stated that, "It is apparent, of course, that they [F.B.I. Agents] do possess the same power of arrest which private persons have. However, it has been found that a greater power of arrest than that possessed by private persons is often desirable and necessary for the proper performance of the duties of a Special Agent." The Director was clearly correct in his conclusion that even before the enactment of the 1934 statute federal officers without statutory powers of arrest could exercise the powers of arrest of private persons. *Dorsey* v. *United States,* 174 F. 2d 899, 901 (C.A. 5); *United States* v. *Lindenfeld,* 142 F. 2d 829, 831 (C.A. 2); Alexander, *The Law of Arrest* (1949) 383.

The 1934 statute empowered F.B.I. agents to make arrests without warrants "for felonies which have been committed and which are cognizable

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inspectors of the Division of Investigation of the Department of Justice are empowered * * * to make arrests without warrant for felonies [which have been committed and which are] cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. [brackets added.]

The bracketed clause was deleted in the 1948 revision of the Criminal Code. The last clause has been superseded by Rule 5 (a) of the Federal Rules of Criminal Procedure.

under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." The court below concluded that the statutory powers of arrest without warrant thus conferred upon F.B.I. agents must be regarded as a "constitutive" rather than as a "cumulative" grant, on the erroneous theory that the specified powers were less than those possessed by private persons at common law, and that therefore the statute could serve only a restricting function. Until the lower court made this ruling, it had never occurred to anyone that F.B.I. agents had less authority in the matter of arrests than private persons. The legislation was not sought or passed with any such idea in mind, and the interpretation reached by the lower court is not warranted by the language or purpose of the legislation.

The conclusion of the Court of Appeals is based upon an erroneous assumption as to the powers of arrest vested in private persons by state law, which, in the absence of a federal statute, is controlling. *United States* v. *Di Re,* 332 U.S. 581, 589, 590; *Johnson* v. *United States,* 333 U.S. 10, 15. The court correctly stated that at common law a private person, as distinct from a peace officer, could arrest without warrant for a felony (1) committed

in his presence, or (2) actually committed in the past if he had reasonable ground to suppose that it had been committed by the person whom he arrested. However, the court overlooked the fact that prior to the 1934 statute in 8 states, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Missouri, New Mexico and New York, the common law rule had been changed by statute or judicial decision to permit a private person to arrest without a warrant for a felony not committed in his presence *only* when the felony was in fact committed by the person arrested.[10] That is, in those 8 states, private persons (including F.B.I. agents prior to the 1934 statute) could make arrests for past felonies only at the risk of a damage suit if they arrested the wrong person—no matter with what justification.

It is clear, therefore, that the limited power of arrest without warrant conferred upon F.B.I. agents in 1934 represented, even with the added limitation of likelihood of escape, a significant increase in their arrest powers in such populous states as New York and Illinois. Also, the 1934 statute constituted, so far as it went, a uniform federal arrest rule not dependent upon the variations of state law. Accordingly, it is not necessary, in

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[10] See American Law Institute, *Code of Criminal Procedure* (draft of June 15, 1930) pp. 239-242; Orfield, *Criminal Procedure from Arrest to Appeal* (1947) 15-17. In 1930, these 8 states had a combined population of 33,000,000 or 27% of the total population of the United States.

order to give meaning to the 1934 statute, to construe it as a limitation upon the powers of arrest previously possessed by F.B.I. agents as private persons. To the contrary, the only reasonable, proper and sound interpretation is that Congress established a minimum, uniform federal rule for arrests without warrant by F.B.I. agents, without intending to take away from them any powers of arrest which they might exercise as private persons under the laws of a particular state. When it is considered that in 1934 the nation was greatly concerned with problems of violent crime, and that in 1932 federal criminal jurisdiction was extended to kidnaping and in 1934 to the robbery of banks other than national banks, it cannot be assumed that the 1934 statute, which for the first time authorized F.B.I. agents to carry firearms, was also intended to reduce greatly their powers of arrest. Also, the result reached by the court below is one which, not having been contemplated, operates to nullify the legislation in important respects, and hampers the law-enforcement agency to the benefit of criminals.

Moreover, the respondent was arrested while she was engaged, as the courts below found, in committing the felony of attempting to transmit information relating to the national defense. The 1934 statute, as originally enacted, was entirely silent as to the power of F.B.I. agents to make arrests without warrants for felonies committed in

their presence. It is inconceivable that Congress thus intended, *sub silentio*, to deprive F.B.I. agents of the power to arrest without warrant for felonies *being* committed—a power possessed by every private person in the United States. It is equally inconceivable that the Department of Justice, which had requested the legislation, would have failed to object to such a result—if it had occurred to anyone.[11] The limitation made by the court below means that on the evening of March 4, 1949, F.B.I. agents were the only persons in the United States with knowledge of the facts who were without authority to arrest Judith Coplon without a warrant, and that they were required by an act of Congress to be silent and passive observers of the actual transmission of government papers to the agent of a foreign power.[12]

We submit that the correct construction of 18 U.S.C. 3052 is to read it as dealing with felonies which *have been committed at some past time*, but

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[11] On June 16, 1934, Attorney General Cummings wrote to the Chairman of the House Committee on the Judiciary, as follows:

> I am informed that the bill passed the Senate yesterday with an amendment. The purpose of the amendment is to limit the power of arrest explicitly to cases in which a felony has actually been committed. I see no objection to the amendment.
>
> I shall be glad if you see fit to move to concur in the Senate amendment so that the bill may become law.

[12] Such a construction would have permitted an arrest by those officers of the Department of Justice participating in the investigation who were not employed in the Federal Bureau of Investigation.

not with felonies which *are being committed in the very presence of* the arresting agent. This interpretation is supported as well by the literal language of the statute as by the canon which admonishes construction of a statute so as to avoid an absurd result. As originally enacted in 1934 (see 5 U.S.C. 300a), it provided that agents were authorized to make arrests without warrant "for felonies *which have been committed and which are* cognizable under the laws of the United States * * *" (italics added). The statute thus made no reference to felonies being presently committed in the presence of the agent and therefore had no application to such felonies. Surely, in granting authority to arrest for past felonies, Congress did not mean to deprive F.B.I. agents of power to arrest without warrant for felonies being committed in their presence. The only rational reason for not referring to the latter was the assumption that the agents already had such power as private citizens. The italicized phrase was deleted in the 1948 revision of the Criminal Code, but so far as appears the deletion was simply for the purpose of better draftsmanship and not for the purpose of extending the statute to an area which it had not previously reached. The Reviser's Note to the change in language refers to it as merely one of "[m]inor changes * * * made in phraseology." Cf. *Ex Parte Collett,* 337 U.S. 55, 65 *et seq.* Apparently it never occurred to the revisers that the statute

applied to anything but past felonies, and so the deleted language was believed to be unnecessary.[13] Thus, in 1948, as in 1934, there is no basis for believing that Congress intended to take from F.B.I. agents the powers of arrest without warrant which they may exercise as private persons with respect to felonies committed in their presence.[14]

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[13] Ignoring the Reviser's stated purpose, it might be argued that the deletion of words "which have been committed and which are", was intended to apply the requirement of likelihood of escape even to arrests without warrant for felonies committed in the presence of F.B.I. agents. This was apparently the view of the Court of Appeals, which also seemed to think that the 1948 deletion restored power to arrest for felonies committed in an agent's presence which had been taken away by the original 1934 statute. If there was a purpose to change the substantive law, it was more probably to further enlarge the uniform statutory arrest powers of F.B.I. agents to permit arrest without warrant where there are reasonable grounds to believe that a felony has been committed and that the person to be arrested committed it. In the jargon of the law of arrest, reference to felonies which have been committed usually connotes the distinction between felonies which have in fact been committed and felonies reasonably believed to have been committed, i.e., the common law distinction between the powers of arrest without warrant of a peace officer and those of a private person. See American Law Institute, *Code of Criminal Procedure* (draft of June 15, 1930) p. 28.

[14] Certainly the Congress has lost no time in disavowing any such purpose, for on January 10, 1951, there was enacted Public Law 915, 81st Cong., 2d Sess., providing that,

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and *make arrests without warrant for any offense against the United States committed in their presence*, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. [emphasis supplied]

We contend, therefore, that on March 4, 1949, in New York City, agents of the Federal Bureau of Investigation could exercise the powers of arrest without warrant which New York law vests in private persons. Section 183 of the New York Code of Criminal Procedure (*supra*, p. 3) provides that, "A private person may arrest another, 1. for a crime committed or attempted in his presence; 2. when the person arrested has committed a felony although not in his presence." The Government's evidence, as reflected in the jury's verdict, shows that Judith Coplon was engaged in committing a felony at the time of her arrest,[15] and was therefore subject to arrest without warrant by any person—including an F.B.I. agent. The applicable conditions of Sections 184 and 185 of the Code governing arrest by private persons were satisfied. The requirement of Section 184 (*supra*, p. 3) that the person to be arrested be informed of the cause of arrest, does not apply where he is in the actual commission of the crime. The requirement of Section 185 (*supra*, pp. 3-4) that a private person arresting another "must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer",

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[15] This felony consisted of attempting to transmit information relating to the internal defense to a citizen of a foreign government with reason to believe that it was to be used to the injury of the United States and to the advantage of that foreign government, in violation of 18 U.S.C. 794. The Court of Appeals specifically held that this crime was in the process of commission at the time of respondent's arrest (R. 2177).

would seem to be supplanted by Rule 5 (a) of the Federal Rules of Criminal Procedure which was satisfied here in that, having been arrested at 9:30 p.m. on March 4, the respondent was brought before Federal Judge Rifkind at about 4 a.m. on March 5 (R. 127).

Since the arrest was valid under New York law, the seizure of the papers in the respondent's purse was a lawful incident of that arrest. *United States* v. *Di Re, supra,* 589-591; *United States* v. *Park Avenue Pharmacy, Inc.,* 56 F. 2d 753 (C.A. 2); cf. *In re Fried,* 68 F. Supp. 961 (S.D. N.Y.), reversed on other grounds 161 F. 2d 453 (C.A. 2), certiorari granted, 331 U.S. 804; writ dismissed, 332 U.S. 807. The considerations of necessity which support search without a warrant by an officer in the case of a lawful arrest (see dissenting opinion of Mr. Justice Frankfurter in *United States* v. *Rabinowitz,* 339 U.S. 56, 73), are equally applicable where a lawful arrest is made by a private person.

b. Assuming *arguendo,* that 18 U.S.C. 3052 circumscribes the power of F.B.I. agents to make arrests with warrants for felonies being committed in their presence, the Court of Appeals erroneously concluded that respondent's arrest was unlawful —in that there was no "likelihood" of her escape before a warrant could be obtained for her arrest. In that court's own words (R. 2180): "The Bureau knew that she had twice been in contact with a Russian, who it was fair to suppose was an emissary of the Soviet Union of one kind or another.

Their meetings had given every appearance of furtiveness and fear of apprehension. She had manifested a persistent interest in secret reports of the Bureau regarding Russia which was somewhat sinister in one of her position. On March 4th, she was apparently prolonging her third meeting with Gubitchev quite unnecessarily, unless it were to find a moment for some critical action; and she was acting with redoubled caution and apprehension." To which we would add the fact that on the evening of the arrest, Coplon and Gubitchev had succeeded in eluding the surveillance for a period of some minutes immediately prior to their arrest, and that they were obviously and consciously seeking to evade any possible pursuers (R. 230-233, 266; Trial Tr. 3305, 3314-3318).

The court's conclusion that there was no "likelihood" of respondent's escape, because escape would put an end to her opportunities for further espionage, seems to be a *non sequitur*. It would be just as logical to assume that respondent might be at her last rendezvous; that if her suspicions were aroused there would be no more meetings, and that she might disappear. The court's conclusion would mean that an F.B.I. agent would have been powerless to arrest without a warrant a person whom he observed counterfeiting or smuggling, for example, so long as a court could speculate that such person would repeat his crimes rather than flee the jurisdiction and that, whether or not there

was repetition, the defendant, although free to leave the scene of the crime, would obligingly remain accessible to the agents until such time as a warrant could be obtained. Escape as of the time when the felony is being committed may be just as injurious to the public interest as eventual flight from the country. A principal and compelling reason for permitting even private persons to arrest without warrant for felonies committed in their presence is to prevent even temporary escape, after which evidence may be destroyed, alibis concocted and witnesses' memories become vague—particularly on the issue of identification. Although "likelihood" ordinarily refers to "probability", it does not require an F.B.I. agent "to be an incorrigible optimist." *United States* v. *White Dental Co.*, 274 U.S. 398, 402, 403. In the case of a felony already completed, and where the suspected person is remaining in his accustomed haunts without apparent fear of apprehension, the likelihood of immediate escape might be too slight to justify arrest without warrant. In this case, as the jury found, the respondent was engaged in the commission of a felony and was evidencing a high degree of apprehension, reflected in extraordinary and evasive maneuvers. Moreover, there is no basis for any speculation as to likelihood of escape in this case where the arrest involved two persons, one a Soviet civil servant, temporarily in this country, believed to be engaged in espionage.

There was every reason to believe that he would escape, if given the opportunity, not only from the scene of the felony, but from the country. See *Eisler* v. *United States*, 338 U.S. 189. It cannot be the law that the F.B.I. agents could and should have arrested Gubitchev then and there, but were powerless to arrest his partner in the crime committed in their presence. If the 1948 revision of the 1934 statute is deemed to have applied the likelihood of escape requirement to arrests for felonies being committed in the presence of an agent, "likelihood" must be construed reasonably in the circumstances of particular cases so as to avoid absurd results.[16]

2. The Court of Appeals held that the trial judge had erred in the pretrial hearing, by examining *in camera* certain records of the wiretapping of telephones used by Miss Coplon, and by restricting the cross-examination of certain F.B.I. agents on the question of whether the Government's original clue in this case was obtained by wiretapping. But the Court of Appeals is in error. The excluded testimony is irrelevant and immaterial because the Government affirmatively established that it had obtained its proof from sources independent of wiretapping, thereby satisfying the rule of *Nardone* v. *United States*, 308 U.S. 338.

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[16] We believe that the Court of Appeals' observation that there had been opportunity to obtain a warrant earlier on March 4 is irrelevant to the question of likelihood of escape.

The Government's proof at the trial was of three kinds, (1) testimony by Miss Coplon's colleagues in the Department of Justice as to her persistent interest in materials relating to Soviet agents; (2) the testimony of the F.B.I. agents who kept her under observation during three trips from Washington to New York and during her meeting with Gubitchev on each of those trips; and (3) the incriminating papers found in her purse when she was arrested on March 4, 1949. The first type of proof was obviously derived from sources other than wiretapping. Also, both courts below found, indeed, it is undisputed, that Miss Coplon advised her superiors in advance of each of the three trips to New York involved in the second class of proof (R. 2155-2156, 2175): thus the Government obtained knowledge of these trips independently from any wiretapping. However, the respondent contended in the court below that she was entitled to discover whether the Government's original clue in this case was obtained from wiretapping, and whether the Government had learned in advance from wiretapping that she would have in her possession at the time when she was arrested the incriminating papers constituting the third class of the Government's proof.

Under Section 605 of the Communications Act (*supra,* p. 4), evidence obtained directly from wiretapping is inadmissible in federal criminal prosecutions. *Nardone* v. *United States,* 302 U.S.

379. Also evidence which is made available or discovered only through the use of information obtained from wiretapping is inadmissible. *Nardone* v. *United States,* 308 U.S. 338 (the second *Nardone* case). In the latter case (p. 341), this Court laid down the corollary rule that

> Here, as in [*Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392], the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. * * *
>
> * * * Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. * * * The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Disclosure of the source of the Government's first information about this case has been withheld for reasons of national security. Since the proof against the respondent was obtained from sources independent of wiretapping, the conviction is unimpeachable even if it is assumed, without conceding, that the Government obtained its original clue in this case from wiretapping. Also, no valid objection may be made, even if it is assumed, *arguendo,* and although the trial judge found to the contrary, that the Government learned in advance from wiretapping that on the evening of March 4 the respondent would be carrying the incriminating documents, because the Government had ample independent information justifying the arrest at that time.

(a) It is clear from the *Silverthorne* and *Nardone* decisions that evidence is not rendered inadmissible because obtained in an investigation which was originally prompted by a clue obtained from wiretapping. All that those decisions require is that every substantial portion of the Government's *proof* be obtained from sources other than wiretapping and which were not discovered from wiretapping.[17] Where that requirement is satisfied,

[17] *Silverthorne Lumber Co.* v. *United States*, held that the Government could not subpoena papers the existence of which it had discovered by an unlawful search and seizure. The second *Nardone* decision, on its facts, was that where it was shown that wiretapping had occurred, the defendant was entitled to inquire whether the Government had discovered from wiretapping the identity of witnesses and of the matters about which they could testify. (*Nardone* petition for certiorari, pp. 4-8).

as it is in this case, the public interest in law enforcement precludes granting immunity from prosecution by making the facts obtained in an investigation prompted by an original clue derived from wiretapping (or from an illegal search) "sacred and inaccessible." For example, if during the course of a search which the courts held to be unlawful or as a result of wiretapping, the Government was informed that there was an information "leak" in the section in which Miss Coplon was employed, could it be seriously argued that the nature of the source of this initial clue conferred immunity from prosecution upon the person or persons found in a subsequent investigation to be engaged in espionage? Or, if the original information similarly obtained was simply to the effect, for example, that Miss Coplon was acquainted with Gubitchev, a Soviet national and civil servant, did she thereby acquire immunity from prosecution even though overwhelming evidence of espionage is obtained from proper sources? The answer must be "no." This Court made it clear in the second *Nardone* case that such remote causal connections do not preclude prosecution. Only if the rule were that facts "improperly obtained" become "sacred and inaccessible," would respondent have been entitled to probe into the source of the original ground for suspecting her. The *Nardone* decision makes plain that this is not the rule. Accordingly, the respondent was not en-

titled to explore into the source of the Government's original information in this case, and it was not error for the trial judge to cut off cross-examination for that purpose.

(b) The respondent's further contention in the court below, that she should have been permitted to inspect the wiretapping records examined by the trial judge *in camera* to discover whether the Government had learned from wiretapping that the incriminating documents would be in her possession at the time she was arrested, thereby leading to the arrest and the seizure of the documents, is likewise immaterial in that the Government had ample probable cause, in no way derived from any wiretapping, to make an arrest at that time.

Miss Coplon informed her superiors in advance of each of her three trips, with the result that she was closely observed by F.B.I. agents during each trip. Their surveillance established that on the first and second trips she was keeping rendezvous with Gubitchev who was not only a citizen of the Soviet Union, but a Soviet civil servant temporarily employed by the United Nations. On both occasions, Miss Coplon and Gubitchev followed devious routes obviously designed to throw off possible observers. These circumstances alone gave rise to a strong presumption of espionage activity. *Report of the (Canadian) Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public*

Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of Foreign Power (1946). It is important to note that Miss Coplon's meeting with Gubitchev on February 18 had consisted of walking at his side for a few seconds with her pocketbook open, whereupon they separated (*supra,* p. 8). The fleeting nature of this meeting, two weeks before her arrest, indicated that information was being delivered to Gubitchev in written form. From these circumstances, the investigators had ample reason, quite apart from any information that may have been obtained from wiretapping, to believe that respondent was engaging in espionage by personally delivering written material to Gubitchev at her meetings with him. Thus, the agents also had ample and independent justification for believing that at the time of the arrest she was engaged in attempting to deliver written information to Gubitchev and that the papers would be on the person of one of them. Accordingly, the respondent was not prejudiced by the trial court's refusal to allow her to determine whether the Government had also obtained such information by wiretapping, since that issue was immaterial under the rule of the *Silverthorne* and second *Nardone* cases.

(c) Furthermore, we submit that the procedure followed by the trial judge with respect to the F.B.I. "taps" records accorded respondent every

right to which she was entitled under the second *Nardone* decision, 308 U.S. 338. As has been pointed out (*supra*, p. 13), most of these records were made available to the defense; concededly, nothing contained in the records thus tendered to the defense constituted "leads" to any of the evidence introduced at the trial, and they present no problem. Those relatively few such records which were not made available to the defense were personally scrutinized by the judge, whose examination satisfied him that they, as in the case of the others, contained no "leads." However, because in his judgment they should be withheld from the defense in the interests of national security, he sealed them as part of a "court's exhibit," to be available for inspection by higher courts on review.

The Court of Appeals, in holding that the procedure followed by the trial judge was error, pointed out that under *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2), where the Government brings criminal proceedings against persons for violations of the law, it may not, in reliance on what would otherwise be a privilege to refrain from producing confidential reports and records in its files, refuse to produce such documents, where their production is vital to the accused's defense because "they will, or may, tend to exculpate" him of criminality. It should be emphasized that there is no claim by respondent that any of the documents sought by her is necessary to her defense, or

contains any information supporting her plea of innocence. In such circumstances, it was said, "[t]he government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." The court below recognized, however, that, under its subsequent decisions, where a defendant's claim that documents in the possession of the Government are vital to the defense is challenged by the Government, the proper procedure is for the trial judge to examine the documents *in camera;* if, in his view, they are helpful to the defense, he should direct that they be turned over to the accused for such use as he can make of them; but if, on the other hand, the judge decides that they have no such evidential value, he should deny the defense access to them, and impound them for later examination by the appellate court, which can thus review the trial judge's determination. See *United States* v. *Krulewitch,* 145 F. 2d 76, 78-79; *United States* v. *Ebeling,* 146 F. 2d 254, 256-257; *United States* v. *Cohen,* 148 F. 2d 94, certiorari denied, 325 U.S. 852; *United States* v. *Simonds,* 148 F. 2d 177, 179; *United States* v. *DeNormand,* 149 F. 2d 622, 625-626, certiorari denied, 326 U.S. 756; *United States* v. *Beckman,* 155 F. 2d 580, 583-584. The court below, in holding that these decisions "do not touch the point at bar," stated that they "go no further than to deny to one party the possible advantage of evidence in the possession of

his adversary; they do not countenance the introduction by one party of evidence in support of his position which the other party is forbidden to see" (R. 2186).

Thus, the court below distinguished adjudicated cases from the instant case on the ground that in those cases the Government did not use the documents in question as part of its proof, whereas here the Government submitted the documents for the court's inspection in partial discharge of its burden of establishing that none of the proof it proposed to adduce against respondent at the trial stemmed exclusively from wiretap sources. If it is assumed, *arguendo,* that the court below was correct in holding (R. 2182) that the Government bears the burden of demonstrating that the proof it proposes to adduce at the trial is wholly derived from "untainted" sources (but see *Nardone* v. *United States,* 308 U.S. 338, 341), the distinction drawn by the court below would be sound. But, we submit that there is an independent reason why the procedure approved in those cases, and followed here, was, notwithstanding the factual distinction to which the court below referred, a proper one. The *Andolschek* holding, *supra,* as the court below recognized (R. 2185), is itself a limited exception to the general rule protecting confidential government records from compulsory disclosure. Under that exception, as we have pointed out, the Government may not, at a criminal trial, invoke

its privilege against disclosure where the result of nondisclosure is to withhold from a defendant documents that are vital to his defense *because of their exculpatory nature.* We think that this relaxation of the general rule is limited to the specific type of situation which engendered the exception, *viz.,* situations in which the records in question are relevant to the issue of the accused's *guilt or innocence* of the crime or crimes for which he has been brought to trial. The issue before the court at the pretrial hearing in this case had nothing whatever to do with respondent's guilt or innocence. The issue was whether any substantial portion of the Government's case was derived exclusively from wiretapping. There is no reason why the trial of such an issue should be hedged by all the rules applicable to a criminal trial. There is no jury. There is no burden of proof beyond a reasonable doubt. Technical rules of evidence are not followed. Since there is no constitutional right to have evidence obtained by wiretapping excluded, *Olmstead* v. *United States,* 277 U.S. 438, it is not necessarily true that a hearing on this preliminary issue must be conducted in accordance with the due process requirements which govern the determination of the issue of guilt or innocence. In the second *Nardone* case, this Court declared only that the wire-tapping issue is to be determined at an informal hearing before the judge alone, who "must give oppor-

tunity, *however closely confined,* to the accused to prove that a substantial portion of the case against him" was exclusively the product of wiretapping. *Nardone* v. *United States,* 308 U.S. 338, 341, italics supplied. In deciding the issue, the judge may exercise "a well-established range of judicial discretion, subject to appropriate review on appeal." *Id.,* 342. These rules give the trial judge a reasonable discretion to determine wiretapping issues fairly and expeditiously. Specifically, we believe that they require the trial judge to devise procedures which will strike a reasonable balance between genuine considerations of national security and the determination of claims that evidence has been derived solely from wiretapping.

In view of the narrowness of the issue before the district court, we submit that the trial judge appropriately exercised the discretion which was his under the *Nardone* decision, in withholding from the defense those relatively few "taps" records which, in his judgment, should be withheld in the interests of national security, once he was satisfied, from his own personal scrutiny, that the withheld records contained nothing of value to the defense on the issue before him. Those records were available to the court below for examination if it chose to inspect them, and, of course, are available to this Court. The trial judge's decision was a resolution of conflicting considerations which accorded respondent her rights under the *Nardone* decisions.

CONCLUSION

The Court of Appeals' erroneous application of the rule of the second *Nardone* case clearly creates serious problems of federal law enforcement, and should be reviewed by this Court. It is in the national interest to determine whether the problems created by difficult security cases can be solved by procedures which protect the rights of accused persons as well as the security of the Nation.

The Court of Appeals' decision as to the proper construction of 18 U.S.C. 3052 defining the powers of F.B.I. agents to make arrests without warrant, is also of unusual importance. It is true, of course, that the recent amendment of that statute has resolved as to future arrests the issues as to its proper scope and application upon which the decision below turned. However, that decision has continuing vitality with respect to the validity of all arrests without warrant which may have been made by F.B.I. agents prior to January 10, 1951, the effective date of the amendment. Moreover, the decision below as to the validity of the arrest will determine the future disposition of this very important case. The documents seized from the respondent's person as an incident to her arrest constitute a vital part of the Government's proof against her. The Government does not expect to have any additional evidence as to the "likelihood" of escape in relation to the validity of respondent's

arrest. Unless the documents are admissible in evidence, the retrial suggested by the Court of Appeals would be futile, even though, as that court noted, her "guilt is plain" (R. 2188). An erroneous construction of the arrest statute which results in granting immunity from prosecution to a former Government employee who has engaged in espionage on behalf of a foreign government and whose "guilt is plain," can only create a public lack of faith in orderly legal procedure. For the reasons stated, we believe the decision below to be erroneous, and we submit that the necessity for review of the arrest question, in addition to the wiretapping issues, is clear.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 4

UNITED STATES OF AMERICA,
Petitioner,

v.

JUDITH COPLON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

LEONARD B. BOUDIN,
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Dated: October 9, 1951.

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United States Constitution:
Fifth Amendment 2, 12, 13
Sixth Amendment 2, 12, 13
5 U. S. C. 300(a) 8
18 U. S. C. 3050 9
18 U. S. C. 3052 ..... 2, 3, 6, 7, 9, 14
18 U. S. C. 3053 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 4

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDITH COPLON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court on the "wiretapping" issues (R. 2146) is reported at 88 F. Supp. 921. The opinion of the District Court denying the return of property seized from respondent at the time of her arrest without a warrant (R. 347) is reported at 89 F. Supp. 142. The opinion of the Court of Appeals (R. 2174) is reported at 185 F. 2d 629.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether respondent's arrest by Federal Bureau of Investigation agents without warrant, absent any likelihood of escape, was in violation of 18 U. S. C. 3052, thereby making inadmissible in evidence against her the papers seized from her person.

2. Whether respondent was not entitled, under the Fifth and Sixth Amendments to the Constitution and under *Nardone* v. *United States,* 308 U. S. 338, to examine the records of her wiretapped telephone conversations to show that her arrest and the Government's case were based upon information secured by the Government from such wiretapping.

3. Whether respondent was not entitled, under the Fifth and Sixth Amendments to the Constitution and under the *Nardone* rule, to examine these wiretap records and to present testimony to show that the Government's investigation of respondent was "touched off" by a wiretapper.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution provides in pertinent part:

> "* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law; * * *."

The Sixth Amendment to the Constitution provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defense."

18 U. S. C. 3052 provided on March 4, 1949, the date of respondent's arrest:[1]

> "The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest."

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (47 U. S. C. 605), provides in pertinent part:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *."

Statement

In January, 1949, upon information received from a "confidential informant", the then Attorney General of the

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[1] The Act of January 10, 1951, c. 1221, § 1 (Public Law 915, 81st Cong., 2d Sess.), amended 18 U. S. C. 3052 so as to make it read as follows:

> "The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

United States authorized the Department of Justice to engage in wiretapping the telephones of respondent, a Government employee (R. 2182). From January 6, 1949 to November 10, 1949, prior to and during the pretrial proceedings herein, 46 agents and employees of the Federal Bureau of Investigation intercepted, recorded and transmitted to their superiors the contents of the respondent's telephone conversations at her office, her home and her parents' home (R. 107-110).

In addition, respondent was under constant physical surveillance by the FBI. She was followed in the course of her work in the District of Columbia and upon several weekend trips to her family in the City of New York. On two of these trips, in January and February of 1949, she met one Valentin Gubitchev, described as a co-conspirator under the indictment below, under circumstances, according to the FBI agents, justifying arrest (R. 229). She was not arrested, however, until March 4, 1949, after the Department of Justice had taken the following steps in pursuance of the planned arrest:

On February 27th its wiretapping convinced the Department that respondent would meet Gubitchev in New York on March 4th at 7 P. M. (R. 2140). It prepared a decoy on March 3rd which was given to her (R. 2176). A Special Assistant to the Attorney General was assigned to the case and ultimately became one of the Government's two trial counsel. He was sent to New York three hours after respondent had left Washington, with instructions that the Washington office would handle publicity (R. 2181). In addition, the number of agents assigned to trail respondent was increased from seven to twenty-four and a matron was detailed five hours before the arrest to take charge of her.

The Department made no effort to secure a warrant for reasons never explained, although judges and commissioners were available (R. 230, 2181). Instead, after the twenty-four FBI agents had followed her on March 4th for several

hours, one of them arrested her while she was concededly walking and talking on a public street (R. 28).

The foregoing facts are not in dispute. From these the court below concluded that "there was not the slightest need of arresting her without a warrant, even if there had been danger that she might run away and hide. It is apparent that even in the morning the Bureau had decided to arrest her that day; and there was not the least need of doing so without a warrant. No sudden emergency forced the hand of the agents; they made everything ready except the one condition which would have made the arrest lawful: a warrant" (R. 2181). Accordingly, the court held that the arrest was invalid and that the papers seized from her at the time were improperly received in evidence.

The second ground for the reversal of the conviction was the District Court's failure to permit full examination of the FBI's wiretap records of respondent's telephone conversations. This evidence consisted of discs containing the results of automatic recording devices, of handwritten logs and resumes made by monitoring agents and of weekly report letters from the New York to the Washington office.

On the very day the District Court issued an order for pretrial hearings, the FBI destroyed all the original New York wiretap records, consisting of discs, logs and resumes —admittedly because of the imminency of trial (R. 2143). This left the weekly report letters of which the district judge read only a few (R. 1453-4, 1487, 1587); and of these permitted respondent only a partial inspection. The Washington records, still available, were shown only in part to respondent. The District Court sought to justify the refusal by ruling that certain of these records were irrelevant (*e.g.* R. 843, 1712) and others affected national security (R. 2184).

The court below held that the Government had the burden of proving a lack of connection between its evidence and the proven illegal wiretapping. It ruled that the burden was not sustained by divulging this evidence to the Court and withholding it from respondent.

The third ground of the Court's decision was based upon the Government's admission that the original conviction was the result of a report of a confidential informant, the customary euphemism for a wiretapper (R. 1458, 1922). Respondent sought in the District Court to show, through examination of the wiretap records and cross-examination of the FBI agent in charge of the investigation (R. 1900), that the confidential informant was in fact a wiretapper. If this were the case, the surveillance, arrest and search and seizure of respondent stemmed from the illegal wiretapping and the papers seized from her at the time of her arrest, upon which the Government predicated its case, would have been inadmissible. *Nardone* v. *U. S.*, 308 U. S. 338. Nevertheless, the trial court, as indicated above, had refused to permit full inspection of the wiretap records; indeed, its own inspection was a limited one. Further, it refused to permit respondent to question the FBI agent on the identity of the confidential informant. The court below, in reversing, held that the trial court's actions violated the *Nardone* rule.

Argument

1. On March 4, 1949 [2] an FBI agent could not lawfully arrest a person without warrant unless there was "a likelihood of his escaping before a warrant [could] be obtained for his arrest." 18 U. S. C. 3052 (formerly 5 U. S. C. 300a). During the sixteen-year period from the passage of the statute to the decision below, the Government and the courts consistently held that this was an absolute condition to the legality of every FBI arrest without warrant.[3]

[2] The discussion below is of course based upon FBI powers as they existed on March 4, 1949, the day of respondent's arrest.

[3] Following the decision of the court below, petitioner filed a post-argument brief with the Court of Appeals for the District of Columbia in *Coplon* v. *U. S.* (Nos. 214 and 272, this Term) arguing to the contrary. Six months later that court adopted petitioner's argument in contravention of every judicial decision on the subject.

Respondent's arrest failed this test, as the resume of facts in the opinion below establishes. The FBI asserted the existence of "probable cause" as early as January 14 and February 18, 1949, which would have supported an application for an arrest warrant (R. 229). Certainly there was adequate time on March 4, during the 12 hours from plan to arrest, to apply to available judges and commissioners in the very building housing the FBI (R. 2181).

Faced with this conclusion, the Government now argues, for the first time, that FBI agents had arrest powers on March 4, 1949, beyond those set forth in the statute. It asserts that (a) FBI agents are private persons; (b) that private persons can make arrests under New York law for a crime committed in their presence; (c) that this crime was committed in the presence of the FBI agents; and (d) that accordingly the agents could arrest without warrant even in the absence of a likelihood of escape before a warrant can be secured.

This argument, aside from its novelty, is contrary to the plain wording of the statute and to the decisions enforcing it. 18 U. S. C. 3052 makes likelihood of escape a condition to all arrests without warrant "for felonies cognizable under the laws of the United States * * *." There are no exceptions to this comprehensive description.

Petitioner's proposed exception would add these words to the law: "* * * except where the felony occurs in the presence of the FBI agent." Since the present wording prevents this construction, it relies upon the words "felonies which have been committed and which are cognizable under the laws of the United States" in the statute as originally passed in 1934. Petitioner argues that the present wording must be given the meaning of the earlier statute and that the latter makes a distinction between past and present crimes.

But the words of the earlier statute referred to all crimes, past and present. The words "which have been committed" were inserted to give less, not more power to FBI agents. They imposed upon FBI arrests the addi-

tional condition that the crime actually have been committed, rather than that it be reasonably believed to have been committed. This is the historical difference between arrests by private persons and those by peace officers. *Beckwith* v. *Philby,* 6 B. & C. 635 (K. B. 1827.)

The condition was imposed by the Senate Judiciary Committee because of its desire further to limit FBI powers of arrest (S. Rep. No. 1434, 73d Cong., 2d Sess.). The then Attorney General recognized it as a *limitation* when on June 16, 1934 he wrote the Chairman of the House Judiciary Committee: "I am informed that the bill passed the Senate yesterday with an amendment. The purpose of the amendment is to *limit* the power of arrest explicitly to cases in which a felony has *actually* been committed. I see no objection to the amendment." [4] (Italics ours.)

The courts have repeatedly ruled [5] that arrests without warrant by the FBI must meet the likelihood of escape condition. *U. S.* v. *DiRe,* 332 U. S. 581; *U. S.* v. *Haberkorn,* 149 F. 2d 720, 721 (C. A. 2d, 1945); *Application of Fried,* 68 F. Supp. 961, 964, rev'd on other grounds, *In re Fried,* 161 F. 2d 453, cert. denied, 332 U. S. 807; *U. S.* v. *Bianco,* 189 F. 2d 716 (C. A. 3d, 1951).

U. S. v. *DiRe, supra,* is cited by petitioner for the proposition that the state law of arrest governs where there was no applicable federal law (Pet. 19). However, this Court made express reference therein to 5 U. S. C. 300(a), as an example of an applicable federal law. It stated that "Federal Bureau of Investigation officers are authorized *only* * * *" to make arrests pursuant to the provisions of the statute, which was quoted in full (p. 590) (italics ours).

The Department of Justice in briefs and argument before both courts below likewise agreed that the legality of

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[4] This appears in correspondence made available by the Solicitor General to respondent's counsel upon his request.

[5] See footnote 3 for the only exception in the companion case.

all FBI arrests without warrant, including respondent's, depended upon proof of likelihood of escape. The same position was taken by United States Attorneys in *Suhay* v. *U. S.*, 95 F. 2d 890 (C. A. 10th, 1938) (Appellee's Brief, pp. 3, 7, 55) and in *Barrett* v. *U. S.*, 82 F. 2d 528 (C. A. 7th, 1936) (Appellee's Brief, pp. 4, 34, 50), where it was admitted that " * * * it was necessary for the Government to prove that there was a likelihood of the defendant escaping * * * before they could obtain a warrant for his arrest * * * "

Petitioner argues that under its new interpretation of the law "the 1934 statute constituted, *so far as it went*, the uniform federal arrest rule not dependent upon the variations of state law" (Pet. 20) (italics ours). But an absolute "uniform federal arrest rule" has resulted from the sixteen years construction of the law by petitioner and the courts.

Petitioner's construction is inconsistent with the provisions of Title 18 governing the arrest powers of other government employees. We refer specifically to Section 3053, giving marshals the express right to make arrests without warrant "for any offense against the United States committed in their presence," and to Section 3050 relating to the power of Federal Bureau of Prisons employees. If it were intended that these employees possess state powers of arrest as well, much of the language of these sections is superfluous. Further, if it were intended that offenses committed in the presence of an FBI agent be a ground for arrest absent likelihood of escape, why should Congress have omitted such a provision from Section 3052 when it inserted it in Section 3053? The Attorney General in 1934 expressly disavowed the suggestion "that our agents be given the powers of United States Marshals" (H. Rep. No. 1824, 73d Cong., 2d sess.). As he said, "it seems to me that went further than was necessary. I did not want to ask for powers as broad as that" (*id.*).

Petitioner's reference to an inter-office inquiry of the Director of the Division of Investigation, the FBI's pred-

ecessor, (Pet. 18) is not a basis for rewriting the statute or ascertaining Congressional intent. This type of unpublished memorandum hardly contributes to legislative history. Further, petitioner has failed to acquaint the Court with the full correspondence. The April 7, 1934 inquiry was as to "just what powers of arrest Special Agents of this Division do possess." The Attorney General's office replied four days later that "the matter is sufficiently doubtful to make it desirable that additional legislation be passed especially conferring upon Special Agents the authority to make arrests, if it is deemed wise that they should have such power." [6]

Limitations upon FBI arrest powers need not be justified by respondent. It is sufficient to note, *en passant*, that Congress opposed the creation of the FBI's predecessor agency and has always, up to very recently, been hostile to an increase in FBI powers (Lowenthal, *The Federal Bureau of Investigation* (1950), *passim*). The FBI was not a law enforcing agency but an investigative one. Prior to the 1934 statute it and its predecessors neither made arrests nor claimed the power to do so. This appears clearly from statements by Attorney General Mitchell (House Committee on Appropriations, 72d Cong., 2d sess., pp. 305-6, Hearings on Dept. of Justice Appropriation Bill for 1934), Attorney General Cummings (Cummings and MacFarland, *Federal Justice, Chapters in the History of Justice and the Federal Executive* (New York, 1937), pp. 380, 381), and the Bureau's Director, J. Edgar Hoover (Senate Committee on Appropriations, 74th Cong., 2d sess., 1936, Subcommittee Hearings on Departments of State, Justice, Commerce and Labor Appropriations Bill for 1937, p. 199) (Proceedings of the Attorney General's Conference on Crime, p. 28, Washington, 1935).

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[6] See footnote 4.

Petitioner expresses surprise that the power of private citizens to arrest without warrant should be greater than that of FBI agents. Their powers are different rather than greater. Even on petitioner's own theory, FBI agents would have less power of arrest in certain instances than private citizens. Further, governmental agents capable of exercising drastic power are often subject to corresponding obligations. Constitutional sanctions are the most obvious example.

In any event, it is absurd to suggest that the FBI agents made the arrest and search and seizure herein in the capacity of private citizens. The arrest followed an official investigation authorized by the Attorney General himself. It was based upon information available *only* to the Government and the use of decoys prepared and delivered by the Government. It was accomplished through a surveillance by 24 FBI agents and an arrest by one of them, stating that he did so in his official capacity.

Our position is confirmed by Public Law 1915, 81st Cong., 2d sess., amending 18 U. S. C. 3052 on January 10, 1951. This amendment was proposed by the Department of Justice on June 27, 1950 (S. Rep. No. 2464, 81st Cong., 2d sess.) on the theory that Section 3052 was the sole source of arrest power. It was supported in Congress by Senator McCarran on the same theory (96 Cong. Rec. 14879, Sept. 13, 1950). See also 96 Cong. Rec. 17109, Dec. 21, 1950, and H. Rep. No. 3228, 81st Cong., 2d sess. The new statute does not apply the likelihood of escape condition to arrests for contemporaneous crimes in contradistinction to past ones—the construction now urged by the Department. It continues to refer to past and present crimes with the words "any felony cognizable under the laws of the United States." It eliminates the likelihood of escape condition from all FBI arrests.

It is apparent that the Government's new construction of the statute conflicts with its plain words, its legislative history, a uniform arrest rule, the decisions of the courts,

the past position of the Department of Justice, and in deed, the significance of the recent statutory amendmen

We see no need to respond to the other Government argu ment that there was a likelihood of escape in view of th incontrovertible facts and the conclusions of the cour below to the contrary.

2. The court below was equally correct in ruling tha petitioner could not withhold from defense counsel th wiretapping records which it showed the trial court. Thes papers, read *in camera* (and in part *unread*) by the tria court were the basis of the latter's decision that the Gov ernment's case did not stem from wiretapping.

The papers could certainly not be withheld if the Gov ernment had the burden of proof, as the court below cor rectly held. *Goldstein* v. *U. S.*, 120 F. 2d 485, 488, aff' 316 U. S. 114. Regardless of the burden of proof, the rec ords were the essence of the pretrial issue: their *connec tion* with the Government's case. Hence, they were sub ject to examination by respondent, as this Court held i *Nardone* v. *U. S.*, 302 U. S. 379, 308 U. S. 338. The injur to respondent rose to a constitutional level when the tria court rendered its decision upon the basis of evidence rea by petitioner and the court but withheld from respondent The Fifth and Sixth Amendments to the Constitutio clearly forbid an adjudication of the central issue betwee the parties upon evidence concealed from one of them This is not a confrontation with witnesses, a public trial or due process of law.

Petitioner, however, asserts (a) that the Governmen "affirmatively established that it had obtained its proo from sources independent of wiretapping" (Pet. 29); (b that evidence obtained in an investigation prompted b wiretapping is admissible (Pet. 32); and (c) that its doc uments were withheld for reasons of "national security (*ibid.*). We deal with these *seriatim*:

(a) As indicated above, the Government sought to es tablish its sources of proof by a comparison of the ev

dence with the wiretap records. It can hardly have "affirmatively established" the absence of connection by making the first set of facts available to the court and the defense, and the second only to the court.

(b) Evidence resulting from an investigation prompted by wiretapping is not admissible under the *Nardone* rule. The wiretapping operations were a crime. The evidence is therefore inadmissible, not only under the Federal Communications Act but under the Fourth and Fifth Amendments to the Constitution. Plainly, it is impossible to trace all connections between wiretapping and arrest and evidence if wiretapping records are withheld. In the instant case, the record presently suggests at least two probabilities: first, that the investigation was "touched off" by a wiretapper of respondent (Pet. 32), and second, that petitioner learned through wiretapping that incriminating documents would be in respondent's possession; hence the arrest (Pet. 30). Is it conceivable that these two points are irrelevant to the *Nardone* rule?

(c) The trial court's actions were improper in three respects. First, it made a ruling upon the basis of wiretap records which it did not read; this error is not the subject of explicit comment in the court below. We are certain, however, that petitioner will not seek to defend the trial court's action in this respect.

Second, the lower court withheld records for reasons of "national security".[7] This it clearly could not do. *U. S.* v. *Andolshek*, 142 F. 2d 503 (C. A. 2d, 1944), cited in *U. S. ex rel. Touhy* v. *Ragen*, 340 U. S. 462 (1951); *U. S.* v. *Cotton Valley Operators Committee et al.*, 339 U. S. 940 (1950); *U. S.* v. *Krulewitch*, 145 F. 2d 76 (C. A. 2d, 1944); *U. S.* v. *Beekman*, 155 F. 2d 580 (C. A. 2d, 1946).

[7] Refusal of the trial court to permit cross-examination of a witness as to *whether* the confidential informant was a wiretapper certainly finds no support in any theory of national security.

Petitioner argues that wiretap records are not necessary to respondent's "defense" (Pet. 36)—as if a defense upon the merits is separable from a motion to suppress. The *Nardone* rule makes the documents "vital to the defense" (see Pet. 37) and hence subject to its inspection. Beyond the rule, there is a constitutional right to exclude evidence illegally obtained.

Third, the trial court withheld certain wiretap records on the ground that they were immaterial (see *e. g.*, R. 1244, 1430, 1712). The national security arguments are plainly inapplicable to such papers. This court held in the *Nardone* cases that the papers were material. Hence the court below was correct in reversing the trial court's action.

CONCLUSION

The Government seeks review of the wiretapping aspect upon the ground that it "creates serious problems of federal law enforcement." This wiretapping was in violation of a federal law. The Department of Justice can eliminate these "serious problems" by avoiding a repetition of the offense. The illegal acts of the FBI surely should not be condoned because they have failed to sustain the conviction of the injured party.

Nor is the argument with respect to 18 U. S. C. 3052 more persuasive. The meaning of the statute is plain. The Government never denied that necessary construction until after the decision below. The recent amendment of the statute not only supports respondent's construction of the applicable law; it has made this case the last involving the instant problem. We question the petitioner's unsupported claim that the decision below will affect other arrests and seizures without warrant.

Finally, the Government suggests that the decision of the court below will create "a probable lack of faith in orderly legal procedure." This is a rather surprising argument when one considers that respondent has been sub-

jected to nearly two years of criminal litigation in two forums as a result of an illegal arrest, search and seizure, and wiretapping, and an interference with her right to counsel—to mention but a few of the assaults upon her rights. (See *Coplon* v. *U. S.*, No. 272, this Term.) The Department's recognition of its obligations under the Constitution and statutes of the United States would be the most effective way to restore public faith in orderly legal procedure.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Dated, October 9, 1951.